IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CASE NO. 03-1140

NATIONAL CABLE & TELECOMMUNICATIONS ASSN.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
STEVEN J. MINTZ
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JOHN A. ROGOVIN
GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

GREGORY M. CHRISTOPHER
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

**Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

ICTA	Independent Cable & Telecommunications Assoc., a trade association of multichannel video programming distributors.
MDUs	Multiple dwelling unit buildings, such as apartment houses and condominiums.
MVPDs	Multichannel video programming distributors, such as cable television operators.
NCTA	Petitioner National Cable & Telecommunciations Assoc.
RCN	RCN-BecoCom, L.L.C., a multichannel programming distributor.
sheet rock	A board that consists of layers of fiberboard or paper bonded to a gypsum plaster core, used instead of plaster or wood panels for walls and ceilings.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CASE NO. 03-1140

NATIONAL CABLE & TELECOMMUNICATIONS ASSN.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTION

This Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth as an addendum to petitioner's brief.

STATEMENT OF ISSUE PRESENTED

The Commission's cable home wiring rule states that wiring is "physically inaccessible" if access would require "significant modification of, or significant damage to, preexisting structural elements, and would add significantly to the physical difficulty and/or cost" of access. For example, at the time this case was decided the rule added in a Note: "wiring embedded in brick, metal conduit, cinder blocks with limited or without access openings would likely be

physically inaccessible; wiring enclosed within hallway molding would not." 47 C.F.R. § 76.5 (mm)(4) & Note.

The issue presented in this case is whether the FCC, given the definition and examples contained in the rule, reasonably clarified that wiring behind sheet rock (also known as plasterboard or dry wall)[1] is physically inaccessible.

COUNTERSTATEMENT

Petitioner National Cable & Telecommunications Association ("NCTA") is challenging the finding by the FCC that cable wiring behind sheet rock is "physically inaccessible" as that term is used in section 76.5(mm)(4) of the Commission's rules, 47 C.F.R. § 76.5(mm)(4).

A. Regulatory Background

Pursuant to the pro-competitive intent of the Telecommunications Act of 1996,[2] the FCC has promulgated regulations intended to foster market opportunities for multichannel video programming distributors ("MVPDs").[3] For instance, of particular relevance to this case, the Commission established procedures regarding how, and under what circumstances, existing "home run wiring" must be made available to competing MVPDs in multiple dwelling unit buildings ("MDUs") where the MDU owner wishes to terminate service by the existing video

---

[1] Sheet rock is a board that consists of layers of fiberboard or paper bonded to a gypsum plaster core, used instead of plaster or wood panels for walls and ceilings. *See* American Heritage College Dictionary (3rd ed. 1997).

[2] The Act was intended to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans." *See* 1996 Conference Report at 1, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[3] *First Order on Reconsideration and Second Report and Order, in re: Telecommunications Services Inside Wiring et al.,* 18 FCC Rcd 1342, 1344 ¶ 2 (2003) (hereinafter "*Commission Order"*) (J.A. 156, 158).

provider or permit more than one MVPD to compete for the right to use the home run wiring on a unit-by-unit basis.[4]

Home run wiring in an MDU is the wiring that runs from the "demarcation point" to the point at which the MVPD's wiring becomes devoted to an individual subscriber. 47 C.F.R. § 76.800(d). The demarcation point is the point at about 12 inches outside of where the cable wiring enters the subscriber's premises, or "where the wire is physically inaccessible at such point(s), the closest practicable point thereto that does not require access to an individual subscriber's dwelling unit." 47 C.F.R. § 76.5(mm)(3).

"Physically inaccessible" is defined as a location that would require "significant modification of, or significant damage to, preexisting structural elements" and would "add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring." 47 C.F.R. § 76.5(mm)(4). The Note to this subsection stated when this case was decided: "For example, wiring embedded in brick, metal conduit or cinder blocks with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not."

Generally, video service is provided to an MDU through a common feeder line or riser cable that serves as the source of the video programming signals for the entire MDU. The riser cable runs vertically in a multi-story building (*e.g.,* up a stairwell).[5] The demarcation point is significant, and is controversial in this case, because it defines the point where an alternative MVPD may gain access to a wire dedicated to the subscriber. If the demarcation point is deemed

---

[4] *See Report and Order and Second Further Notice of Proposed Rulemaking, in re: Telecommunications Services Inside Wiring et al.*, 13 FCC Rcd 3659 (1997) (J.A. 1).

[5] *Commission Order* at note 5 (J.A. 158).

to be physically accessible just outside the subscriber's premises, the alternative MVPD must extend a home run wire to that point, extract the wire devoted to the subscriber's unit, and connect the two wires. If the demarcation point is deemed to be physically inaccessible, the alternative MVPD may attach at the closest practicable point, which is often the junction box on the subscriber's floor and which contains the existing link between the subscriber and the incumbent provider.

If the alternative MVPD attaches at the junction box and thereby makes use of the wire link that exists from the junction box to the subscriber's premises, and if that wire link was installed by the incumbent video provider, the incumbent is entitled to reimbursement at full replacement cost of that wire, as well as any passive splitters on the subscriber's side of the demarcation point. 47 C.F.R. § 76.802(a).

B. The Request for Clarification

RCN-BecoCom, L.L.C. ("RCN") asked for a letter ruling from the FCC to clarify that wiring located behind sheet rock is not accessible, and the demarcation point is thus located at the first accessible point which, as mentioned, is often the junction box of the incumbent video provider. RCN cited its problems in providing service to Boston MDUs where Cablevision of Boston, the franchised cable television operator, is the dominant video provider and has frustrated RCN's efforts to provide video services that are competitive with those of Cablevision.[6]

RCN explained that when it installs its riser cables in an MDU, there are only two ways of getting access to a would-be subscriber's television set. Either it can connect with the existing

---

[6] Letter from William L. Fishman, counsel for RCN, to Deborah A. Lathen, Chief, Cable Services Bureau, dated Sept. 23, 1998 (J.A. 250).

wiring at Cablevision's junction boxes, or it can overbuild the existing subscriber line by extending a home run wire to the demarcation point outside the individual units. However, RCN continued, the latter option is often not available. "MDU owners and managers will not allow RCN to cut, open, plug, spackle, tape, sand and paint the ceilings and walls in order to install new lines because it is disruptive and eventually could require the replacement of entire ceilings and walls." *Id.* at page 3 (J.A. 252). Accordingly, RCN contended, the only way to reach "hundreds of waiting subscribers" is to interconnect its riser cable with Cablevision's junction boxes, but Cablevision "has declined to cooperate with RCN in making such arrangements." *Ibid.* RCN provided an affidavit attesting to these difficulties.[7]

Representatives of other alternative MVPDs supported RCN's request. The Independent Cable & Telecommunications Association ("ICTA") stated: "Property owners typically object to competitive providers removing sections of walls and/or moldings in order to access wiring at the demarcation point as currently defined, because of the disruption and possible damage to walls and molding. The result is that competition is suppressed in the MDU environment, in direct contradiction with the goals of the Commission's rules governing the disposition of cable inside wiring."[8]

ICTA also addressed the difficulties in retrieving wire embedded behind sheet rock walls and ceilings. "While it is physically possible to cut through sheet rock," ICTA said, "it is not a simple matter."[9] ICTA explained that each unit, often several hundred units in a single building,

---

[7] Affidavit of Thomas K. Steel, Jr., vice president, appended as Exhibit A to RCN's Reply to Oppositions to Request for Letter Ruling, dated Nov. 2, 1998 (J.A. 341).

[8] Attachment to letter from ICTA to FCC, dated December 13, 2000, at page 1 (J.A. 363). *Accord,* Reply Comments of Ameritech New Media, dated Nov. 2, 1998, at page 2 (J.A. 312).

[9] Letter from ICTA to FCC, dated June 6, 2000, at page 10 (J.A. 355).

must have a six to 18 inch rectangle cut in the wall or ceiling. After the wire is fished out, "each such penetration of each unit must then be patched, sanded, primed, and painted to match (if possible) the prior paint." *Ibid.* Such repairs require perfect seams and sanding, ICTA asserted, which take two days to complete. In the case of many upscale properties, ICTA continued, "entire hallways have to be re-wallpapered to restore the original finish." *Ibid.* ICTA observed that moving the demarcation point to the junction box would not involve any repairs, painting, or wallpapering and would yield "significant cost savings due to reduced work hours." *Id.* at page 11 (J.A. 356).

No parties to the proceeding disputed these contentions. Instead, the incumbent video programmers dismissed the necessary work as minor and routine.

> Sheet rock is "easily and inexpensively manipulated using common hand tools such as drills and hammers without causing significant modification to, damage, or interference with a building's preexisting structural elements."[10]
>
> "Sheet rock is cut and repaired every day by technicians doing all kinds of work. … The patch or the new piece of sheet rock may need to be repainted or wallpapered but this is hardly a 'significant modification' or 'damage to' a structural element in an MDU building."[11]
>
> "Typically, the technicians … repair the hole either with inconspicuous wall plates which match the building's interior or by spackling, patching, and painting or wallpapering over the access hole."[12]
>
> "Getting at wiring behind sheet rock is hardly comparable to accessing wiring behind or encased in brick, metal or cinder blocks. Indeed, its degree of difficulty is much more like cutting into and repairing hallway moldings."[13]

---

[10] Comments of Comcast Cable Communications, Inc., dated Oct. 22, 1998, at page 5 (J.A. 288).

[11] Opposition to Request for Letter Ruling, filed Oct. 22, 1998, by Adelphia Communications *et al.,* at page 5 (J.A. 264).

[12] Opposition of Time Warner Cable, dated Oct. 22, 1998, at page 6.

[13] Opposition of NCTA, dated Oct. 22, 1998, at page 7 note 12 (J.A. 303).

> "Cutting sheet rock and fishing wire through a wall behind plaster or sheet rock is hardly unusual; it is probably familiar to most homeowners who have performed renovations."[14]

C. The Commission's Decision

The Commission stated first that a connecting wire is "physically inaccessible" under the rule where access to that wire requires significant modification of, or significant damage to, preexisting structural elements. *Commission Order* at ¶ 52 (J.A. 176), *citing* 47 C.F.R. § 76.5(mm)(4). The Commission then observed that the Note to the rule helps define "inaccessibility" by providing examples: wiring embedded in brick, metal conduit or cinder blocks is likely inaccessible; wiring enclosed within hallway molding is not. Sheet rock is not specifically mentioned in the rule, the Commission said, but in its judgment, "sheet rock is more like 'brick or cinder block,' materials also commonly used to form ceilings and hallways, than molding, which is not." *Commission Order* at ¶ 52 (J.A. 176).

The Commission also observed that the definition of "physically inaccessible" requires that access to the wire would "add significantly to the physical difficulty and/or cost" of connecting, and the Commission found that sheet rock satisfies that test. *Commission Order* at ¶ 53 (J.A. 176). The Commission acknowledged that "cutting a hole through and repairing sheet rock is neither as physically difficult nor as costly as boring through brick, metal or cinder block." Nevertheless, the Commission declared, "we are satisfied that it adds significantly to the physically difficulty and cost of wiring an MDU." *Id.*

Accordingly, the Commission amended the Note appended to Section 76.5(mm)(4) to include sheet rock, *id.,* and NCTA petitioned this Court for review.

---

[14] Opposition of Cablevision Systems Corp., filed Oct. 22, 1998, at page 5 (J.A. 275).

SUMMARY OF ARGUMENT

Accessing cable wire behind sheet rock entails cutting a hole in the sheet rock, fishing out the wire, and then repairing the hole by spackling, taping, sanding, and painting or wallpapering. The Commission's determination that this operation constitutes "significant" damage, modification, and/or difficulty was a reasonable interpretation of its rule.

ARGUMENT

GIVEN THE DEFINITIONS AND EXAMPLES SET FORTH IN THE RULE, THE COMMISSION'S DECLARATION THAT WIRING BEHIND SHEET ROCK IS "PHYSICALLY INACCESSIBLE" WAS A REASONABLE CLARIFICATION OF THE RULE.

Section 76.5(mm)(4) of the Commission's rules, 47 C.F.R. § 76.5(mm)(4), states that a wire is physically inaccessible if access to that wire entails "significant modification of, or significant damage to" preexisting structural elements and would "add significantly" to the physical difficulty and/or cost of access. The dispute in the case centers around the meaning of the word "significant."

To NCTA, cutting a hole in sheet rock, fishing out the wire, and then repairing the hole by spackling, taping, sanding, and painting or wallpapering does not constitute "significant" damage, modification, cost and/or difficulty. To NCTA, this operation is more akin to extracting wiring placed behind hallway molding, which the Note to the rule says is probably not physically inaccessible.

To the FCC, cutting and repairing sheet rock may not be as difficult or costly as boring through metal or cinder block, but the damage, modification, cost and/or difficulty are nonetheless significant. This interpretation of the word "significant" in the FCC's own rule is entitled to substantial deference, especially in the absence of any showing that the interpretation

was arbitrary or capricious. *E.g., Cassell v. FCC,* 154 F.3d 478, 483 (D.C. Cir. 1998); *C.F. Communications Corp. v. FCC,* 128 F.3d 735, 738 (D.C. Cir. 1997). The agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994).

NCTA faults the Commission for not having made an *express* finding that retrieving a wire behind sheet rock would result in "significant modification of, or significant damage to," a structural element and for not explaining why NCTA and its allies are wrong in claiming that the damage, modification, cost and/or difficulty are really *not* "significant." Moreover, NCTA complains that the Commission accepted RCN's claim that the damage, modification, cost and/or difficulty *are* significant without the benefit of supporting affidavits. NCTA brief at 13-15.

NCTA's quibbles are just that. In the order on review, the Commission set forth each of the elements of the rule and concluded that "cable wiring behind sheet rock is 'physically inaccessible,' as that term is used in [the rule]." *Commission Order* at ¶¶ 48, 52 (J.A. 175, 176). The finding that access requires "significant modification of, or significant damage to" the sheet rock is plainly implicit in that conclusion.

Likewise, affidavits by RCN would have been superfluous as all the parties agreed to the fact that access to wiring behind sheet rock requires cutting, spackling, taping, sanding, and painting or wallpapering the sheet rock. *See* page 7 *supra.* Whether or not this operation entails "significant" damage, modification, cost and/or difficulty is a matter of judgment, which would not be enhanced by an affidavit. Indeed, the essence of this case is NCTA's quarrel with the FCC judgment that the damage, modification, cost and/or difficulty *are* significant. NCTA's judgment to the contrary, even when that judgment is supported by affidavits, does not render the FCC's judgment arbitrary and capricious.

CONCLUSION

The Commission's clarification of its rule was not arbitrary or capricious. NCTA's petition for review of that clarification should be denied.

Respectfully submitted,

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

JOHN A. ROGOVIN
GENERAL COUNSEL

MAKAN DELRAHIM
DEPUTY ASS'T ATTORNEY GENERAL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

ROBERT B. NICHOLSON
STEVEN J. MINTZ
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

GREGORY M. CHRISTOPHER
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

October 23, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NATIONAL CABLE & TELECOMMUNICATIONS ASSN., PETITIONER V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS	)	CASE NO. 03-1140

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 2586 words.

GREGORY M. CHRISTOPHER
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

October 23, 2003